

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHRISTIAN PETERSON,

Defendant.

FINAL PRETRIAL
CONFERENCE ORDER

12-cr-87-bbc

A final pretrial hearing was held in this case on May 8 and May 15, 2014 before United States District Judge Barbara B. Crabb. The government appeared by Paul Connell and Peter Jarosz, Assistant United States Attorneys. Defendant was present in person and by counsel, Craig Albee and Julie Linnen.

Counsel predicted that the case would take 5-8 days to try. That seems longer than necessary, but I will tell the jurors that it might last that long so that they will be available to continue into the second week. If the trial does go into the second week, it will be held on Tuesday and Wednesday, May 27 and 28 and Friday, May 30. Trial days will begin at 9:00 and will run until 5:30, with at least an hour for lunch, a short break in the morning

and another in the afternoon.

The witnesses will be sequestered. Counsel are either familiar with the court's visual presentation system or will make arrangements with the clerk for instruction on the system.

Counsel should use the microphones at all times and address the bench with all objections. If counsel need to consult with one another, they should ask for permission to do so. Only the lawyer questioning a particular witness may raise objections to questions put to the witness by the opposing party and argue the objection at any bench conference.

Counsel are to provide the court copies of documentary evidence before the start of the first day of trial.

A. Rulings on Motions Relating to Jury Selection and Instructions

1. Regarding jury selection, defendant's motion to have the jurors answer a written questionnaire before jury selection, dkt. #89, was denied, as were his motion for separate questioning by counsel of prospective jurors, dkt. #86, his request for counsel to participate in the voir dire, dkt. #84, and his request to ask about the jury's propensity to do research or investigation in the course of the trial. Dkt. #86. Defendant's request for questions concerning gambling was granted; his request to ask questions about political office or blogging was denied.

2. Regarding instructions, the court will give the introductory instructions to the jury

before opening statements, in the form approved by the magistrate judge, with the addition of the words “and through deliberations on the verdict” at the end of the word “case” in the second line of the fourth paragraph on page 2. Defendant’s proposed new post trial instructions, dkt. #113, will be considered at the instruction conference to be held after the close of the evidentiary stage of trial. However, his request that the court re-read the introductory instructions at the end of the trial, dkt. #87, was denied. Defendant’s requests that the court give pattern instructions on the failure of the defendant to testify, impeachment by prior convictions and evidence of other acts by defendant, id., were granted as unopposed. Defendant’s request for the giving of an instruction on opinion testimony was granted, id., but the instruction will be modified to exclude any reference to the witnesses’ qualifications, as neither party intends to call any experts.

Defendant’s request for a unanimity instruction in connection with counts 5-8, dkt. #87, was denied, because each count charges only one false statement. The same is true with respect to counts 1-4. Even if those counts are not limited to one means, they charge only one element, making a unanimity instruction unnecessary

Defendant objected to the giving of any instruction on responsibility. A ruling was reserved on this objection until after all the evidence has been introduced and defendant’s defense can be discerned.

Defendant’s request to have the jury instructed separately as to each count was

denied.

3. Regarding summary charts, the government will be allowed to use such charts as evidence under Rule 1006, provided that the charts meet the criteria for admissible evidence.

B. Government's Proposed Evidence

1. The government is not to introduce evidence of the way in which defendant allegedly defrauded Dr. Shapiro in connection with the Pancake Café because it has not shown that this evidence has any relevance. Dr. Shapiro was unaware of the fraud until years later, so it could not have influenced his decisions or actions during the relevant time period.

2. The government may introduce the following evidence:

a. Evidence that defendant provided misleading information to his accountants in connection with the filing of a 2005 business tax return concerning entries for alleged purchases of equipment that he did not buy. This evidence is admissible to show defendant's knowledge of the general ledger, his understanding of the tax code and his knowledge of accounting.

b. Evidence of defendant's instruction to Nancy Platner, an employee of the Pancake Café, not to deposit \$10,000 in cash receipts from the restaurant. The evidence is admissible to show defendant's knowledge of the books and records of his business and his

intent to mislead his accountants.

c. Evidence of defendant's attempt to deduct gambling losses on his Maverick, Inc. tax return. This evidence is admissible to show defendant's knowledge of the fact that such losses are not valid deductions.

d. Evidence from Dan McGown that he saw defendant playing multiple hands of blackjack in Las Vegas in August 2006 to show that defendant knew about the gambling business, the level of his gambling and his habit and to provide context for the large monetary transfers he made from Maverick to casinos.

e. Hearsay statements by Patrick Sweeney, made on or about December 7, 2007, concerning a loan from Greenwoods State Bank that was intended to fund a construction project of one of defendant's companies. These statements are admissible as adoptive admissions under Fed. R. Evid. 801(d/2)(B).

f. Documents and testimony based on documents (exhs. ##W29-1-W29-7, W27-W27-2, W30-1-W30-2 and W22-8). None of these documents are subject to any privilege.

C. Government's Motions in Limine

1. Defendant is barred from arguing or introducing evidence to show that he relied on the advice of an accountant or lawyer unless he can prove that before he took any action, he sought in good faith the advice of a lawyer or accountant he considered competent for the

purpose of obtaining advice about the lawfulness of his potential future conduct, made a full and accurate account to the lawyer or accountant of all material facts and acted strictly in accordance with the advice of his counsel or accountant. Although defendant says he does not disagree with the government's position, he may try to offer evidence for a different purpose, such as the effect of the comments of counsel or accountants on his state of mind. It seems unlikely that such evidence would be admissible. Before defendant's counsel gets into that topic, he should advise the court so that the issue can be argued outside the jury's presence.

2. The government has moved to bar defendant from presenting evidence that bank employees knew of his fraud scheme or participated in it. The victims in this case are the banks themselves; their status does not change if rogue employees helped defendant perpetrate an illegal scheme. Defendant does not oppose the motion so long as it is limited to prohibiting argument that a bank employee's knowledge of fraudulent conduct is a complete defense to bank fraud. I am not prepared to impose such a limitation at this point. Under Seventh Circuit case law, a defendant cannot argue that he acted in good faith in dealing with the bank if he has not shown that he can meet the requirements of the advice of defense counsel. United States v. Philpot, 733 F.3d 734, 747 (7th Cir. 2013). To the extent defendant intends to rely on United States v. Phillips, 731 F.3d 649 (7th Cir. 2013), he must keep in mind the specific and limited holding in that case.

3. Defendant may not argue or suggest that any victim's bank recovery of funds from a third party means that defendant did not defraud that bank. However, the government may adduce evidence of the intended loss to the bank or banks, even if some or all of the loss was covered by insurance.

4. Defendant may not introduce evidence that he was acting in good faith when he made his draw requests to the banks.

5. Defendant may not introduce evidence that he had an honest belief that he would have been able to perform on the loans eventually or would have paid them back. Defendant does not intend to introduce any such evidence but argues that the government should not be allowed to put in evidence that he had no intent to pay back his loans. This argument is rejected. The government may put in this evidence.

6. Defendant does not oppose the government's motions to prohibit him from arguing the potential penalties he faces (motion in limine #6), from trying to define reasonable doubt (#7) or from introducing evidence of negligence by a victim bank or financial institution (#8) but he maintains that "a bank's actions, inactions and representations are relevant to [his] state of mind, whether any false statements were knowingly made, whether [he] had intent to defraud, whether statements were material, and whether the statements were made to influence the banks." Dkt. #110 at 4-5. As for the intent to defraud element, the Court of Appeals for the Seventh Circuit has held that the advice of counsel defense and

the good faith defense “operate to the same end,” Philpot, 733 F.3d at 747, which means that he cannot argue good faith and avoid the obligation of proving up the advice of counsel defense. However, the court of appeals has also held that in certain circumstances a defendant may be able to show that he has not knowingly made a false statement. Phillips, 731 F.3d at 656. In Phillips, the mortgage broker told defendants that what they wrote on their application for a mortgage loan would not affect the lender’s decision to grant the application and the defendant’s were naive and uneducated about the requirements of mortgage law. Id.

7. Defendant opposed the government’s motion in limine #9, dkt. #126, to bar defendant from arguing that he repaid money to the Maverick 401(k) Plan and Trust at some point after he deposited the funds into his personal bank account on February 13, 2009 and then dissipated the funds. After hearing argument, the government withdrew its motion.

D. Defendant’s Motions in Limine

1. Defendant’s motion to strike certain language in the indictment as surplusage was denied. The motion is no longer relevant now that the indictment has been amended to exclude the disputed language.

2. Defendant’s motion in limine #1 to bar the government from introducing any

evidence relating to kickbacks involving Leapfrog, Foamex and Ron and Linda Simonetti, dkt. ## 85 & 127, was denied because (1) the evidence is relevant to defendant's ability to obtain a loan; (2) he admitted to an employee that he knew the kickbacks were being paid; (3) defendant has known about the kickback evidence since at least February 2014; and (4) it is part of the scheme to defraud. The government may introduce evidence that defendant made the admission of the kickback scheme to his employee, but is not to elicit evidence that the employee was having an affair with defendant or that they were both intoxicated when the defendant's admission was made.

3. Defendant's motion in limine #2 to disallow any evidence related to the termination of Linda Platner from the Pancake Café and her complaints about wages, dkt. #88, is denied. It is relevant to defendant's intent to take money from his employees' 401(k) plan.

4. Defendant's motion in limine #3 to exclude any evidence of defendant's alleged possession of \$1 million in cash. The government does not object to this motion unless defendant opens the door at trial.

5. Defendant's motion in limine #4 to exclude evidence of his April 2008 trip to Nevada was denied, but the evidence can be used only if defendant takes the stand.

6. Defendant's motion in limine #5 to exclude evidence of his alleged drug use or womanizing was granted. The evidence is inadmissible unless defendant opens the door at

trial. 7. Defendant's motion in limine #6 to bar evidence of communications between defendant and his lawyers (Sweeney and Buye) was denied. His motion to bar evidence of two emails sent in connection with his divorce was denied as well unless he can show that the emails are privileged. To make that showing, defendant would have to show both that the disclosure of the emails in a prior state court proceeding did not destroy the privilege and that the only persons privy to the emails were himself, his lawyers and accountants retained by his lawyers. At this point, he has not made the required showing.

8. Defendant's motion in limine #7 to exclude evidence of money lost by his partners, Shapiro, Fink and Spahr, was granted in part. The government may put in evidence that these men lost money, but may not adduce evidence of the amounts.

9. A ruling will be reserved on defendant's motion in limine #8 to exclude evidence of Spahr's complaints and contemporaneous notes by Van Den Heuvel. The need for a ruling will depend on the testimony of these two potential witnesses.

10. Defendant's motion in limine #9 to prohibit the government from introducing any lay opinions from any witness as whether defendant's conduct was fraudulent or unlawful or that his statements were false or that he knew they were false, dkt. #125, was granted. The government will not introduce opinion evidence of fraud, illegality or false statements. However, it may introduce evidence of what the reviewing accountant found without eliciting any opinion from the accountant.

E. Certifications from Corporate Representatives

It will not be necessary for the government to call any corporate representatives to authenticate business records. Defendant has objections to the relevance of a few specific corporate records that he is to resolve with the government before trial.

Entered this 16th day of May, 2014.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge